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Accountability for Human Rights: Applying Business and Human Rights Instruments to Non-Governmental Organisations

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ABSTRACT

Often seen as selfless champions of human rights, NGOs are vulnerable to attacks from unscrupulous states, which makes NGO regulation and accountability for human rights a sensitive issue. Yet, like all organisations, NGOs can have negative human rights impacts. States and international organisations have developed business and human rights (BHR) instruments that apply to corporations but there is no equivalent for NGOs. This article assesses the extent to which BHR standards may be relevant to enhance NGO accountability for human rights. It argues that these instruments, although not designed with NGOs in mind, are relevant to their operations and provide an attractive and moderate avenue to enhance NGO accountability. Ultimately, it shows that applying BHR instruments to NGOs could strengthen these instruments.

KEYWORDS: NGO accountability; business and human rights; UN Global Compact; OECD Guidelines for Multinational Enterprises; UN Guiding Principles on Business and Human Rights.

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1. Introduction

Non-Governmental Organisations (NGOs) are key actors in the development and functioning of the international human rights regime. Their contribution to standard-setting, reporting, fact-finding and for the overall promotion, implementation and enforcement of human rights standards is significant (Steiner et al. 2007: 1421). Aside from campaigning in favour of human rights, NGOs play a pivotal role in holding States, businesses and international organisations accountable for their adverse human rights impact, operating as watchdogs in the international arena (Polizzi and Murdie 2019: 253).

But NGOs are now coming under greater scrutiny for their own human rights impact. The 2018 Oxfam GB scandal in Haiti and the WWF alleged human rights violations in Cameroon have shown that NGOs can fail to uphold human rights and that they should be subject to external verification (Carolei 2019). There is a broad recognition that if the NGO sector is to hold governments and businesses accountable, it needs to demonstrate its own legitimacy, openness and transparency (e.g. Crack 2019; Jordan and van Tuijl 2006; Edwards 2000). The debate on NGO accountability goes hand in hand with the growth of the NGO sector in terms of size, visibility and political influence on the global stage (Naidoo 2003: 1). Global governance is no longer the domain of States and intergovernmental organisations. Along with business enterprises, NGOs have become important actors. Yet the proliferation and professionalisation of NGOs have not been accompanied by a process of regulation in contrast to other non-State actors such as business enterprises (ibid: 3). For these reasons, the questions of NGO accountability for human rights, and their compliance with international human rights standards can no longer be ignored.

As a response to the growing demand for greater accountability, NGOs have developed their own voluntary standards (e.g. codes of conduct, accreditations schemes, peer-assessment tools etc.). Prominent attempts to regulate the industry include the Sphere Standards (Humanitarian Charter and Minimum standards), Accountable Now and the Red Cross Code of Conduct (Guénéheux and Bottomley 2004). Self-regulation has been criticised because it rarely offers any compliance and enforcement mechanisms, leading to patchy and inconsistent implementation (Traxle et al. 2019; Crack 2016; Hammad and Morton 2011). In October 2019, the UK House of Commons International Development Committee suggested that the NGO sector should move beyond self-regulation, because it failed to ensure that safeguarding and accountability standards

are being upheld by NGOs (2019: 18). Regulating NGOs is difficult. At the national level, increased public regulation is not a feasible route to promote greater accountability in the NGO sector since it carries the risk of restrictive actions promoted by governments that wish to silence NGOs for political reasons. Restrictions on NGO activities, including those implemented as a response to the COVID-19 crisis, are on the rise worldwide and this trend is not limited to authoritarian or illiberal nations as scholars (M. Glasius et al. 2020) and the Council of Europe (2019) have documented.

Moreover, there is no international instrument setting human rights responsibilities for NGOs in international human rights law (Lindblom 2005: 187-189). There is, therefore, an NGOs regulatory and accountability gap within international human rights law. The international human rights legal order is state-centric, meaning that States are viewed as the sole recipients of human rights obligations and NGOs, just like other non-State actors, do not possess full legal personality in international law (Ben-Ari 2013). As such, they are absolved from fulfilling human rights obligations. The historical changes brought by globalisation have illustrated how non-State actors, especially business enterprises, can affect the enjoyment of human rights by individuals depending on how corporate power is exercised (Osuji 2011). In response, sophisticated, though largely non-binding, business and human rights standards were developed at the international level (Bernaz, 2017). For the purpose of this article, 'business and human rights instruments' are the three major business and human rights initiatives: the UN Global Compact (GC), the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the UN Guiding Principles on Business and Human Rights (UNGPs).[1] So, while business and human rights standards have been developed, no similar attempt has been made to address the human rights responsibilities of NGOs.

Against this background, this article aims to answer to the following research question: to what extent may business and human rights standards be relevant to enhance NGO accountability for human rights?[2] This question is pertinent for three reasons. First, many NGOs bear similarities

[1] These initiatives were selected because they represent the most tangible efforts of the international community to regulate businesses, and they are interconnected. Following the adoption of the UNGPs in 2011, the OECD Guidelines were updated. The Guidelines now include the corporate responsibility to respect human rights, formulated in the same way as in the UNGPs, thus creating a form of convergence of business and human rights standards (Bernaz 2017: 202). Moreover, as Wynhoven has argued, the GC and the UNGPs complement each other in the sense that the UNGPs set standards and the GC provides a platform on how to comply with them (2011: 87-88).

[2] As stated in the research question, in this paper we focus on NGO accountability *for human rights* from a legal perspective. There is an extensive literature on NGO accountability across the social sciences (Ebrahim 2003; Jordan and van Tuijl 2006; Crack 2019). Multiple definitions of accountability exist, and scholars have analysed the concept from different angles exploring "for what", "how" and "to whom" NGOs should be accountable. On the contrary, the

with corporations. Some engage in business activities to achieve their non-profit aims and they also have transnationalised their organisational structure in a manner comparable to multinational business enterprises (Kell and Ruggie 1999: 8). In this respect, the former secretary-general of CIVICUS (a global network of NGOs and international activists) noticed that 'biggest NGOs today look and act like multinational corporations (…) they have corporate-style hierarchies and brands worth millions. Saving the world has become big business' (Sriskandarajah 2014). Second, there is a research gap because the academic literature on business and human rights law and on NGO accountability have so far developed separately. On the one hand, business and human rights scholars have investigated the contribution of NGOs in promoting corporate accountability, but they never questioned whether business and human rights standards are relevant to non-corporate entities, such as NGOs (e.g. Bernaz and Pietrapaoli 2017; Sullivan 2005; Spar and La Mure 2003). On the other hand, NGO scholars have focused on various means of organisational accountability (e.g. self-regulation, participation and feedback mechanisms) but they have never explored whether business and human rights standards could provide an avenue to hold NGOs accountable (e.g. Ebrahim 2003; Jacobs and Wolford 2007; Berghmans et al. 2017). Third, this question is societally relevant because, as documented further in the paper, a growing number of NGOs have signed up the GC, and there is an emerging caselaw that considers whether the OECD Guidelines should apply to NGOs. Accordingly, the paper's findings are relevant not only for NGOs to develop a better understanding of their potential responsibility under business and human rights initiatives, but also for bodies (e.g. OECD National Contact Points) called to handle complaints against NGOs.

In order to ascertain the extent to which business and human rights standards may be relevant to enhance NGO accountability for human rights, this paper engages in two levels of analysis. First, we look at the applicability of business and human rights standards to NGOs from a legal perspective. We scrutinize the normative content and regulatory structure of the three instruments, taking into account relevant caselaw as well as doctrinal and societal debates. Second, we examine the suitability of business and human rights standards for NGO accountability. To determine the suitability of business and human rights standards, we examine the extent to which

legal accountability of NGO is "a rather undeveloped area in international law" (Lindblom 2011: 190), and there is no instrument that defines a set of human rights responsibilities for NGOs. It was noted that the "apparent neglect for NGO responsibility/accountability in international legal discourse can be understood and explained by the combination and preoccupation with (the absence of) international legal personality and extant normative focus on NGO rights." (Noortman 2019: 194).

NGOs are willing to, and capable of, subjecting themselves to business and human rights standards. Then, we examine the suitability of business and human rights initiatives by investigating the appropriateness of applying a set of standards, traditionally designed to regulate a business, to a different type of non-state actor. Overall, we argue that business and human rights instruments, even though they were not designed with NGOs in mind, could be important tools for NGOs accountability especially when NGOs undertake business-like activities. Moreover, subjecting NGOs to business and human rights standards could contribute to strengthening these standards. Before diving in these issues, the next section defines non-governmental organisations.

2. Defining Non-Governmental Organisations

The term NGO was first used by the UN around 1945 when a small club of international social movements acquired observer status within the Economic and Social Council (Charnovitz 2006: 348). Any discussion on 'what an NGO is' is inescapably linked to descriptions of civil society. Located between the market, the family and the State, civil society is a tripartite concept which brings together 'the world of associational life', 'the good society' and 'the public sphere' (Edwards 2004) Civil society is populated by different actors. The World Bank nicely captured the heterogeneity of the civil society landscape, which according to them encompasses a multitude of associations including community groups, NGOs, labour unions, indigenous groups, charitable organisations, faith-based organisations, professional associations, and foundations (2013). NGOs are a subset of civil society associations described as independent, non-profit-making, self-appointed and self-governing entities that campaign for the well-being of others (Vakil 1997: 2068). According to Edwards, 'if civil society were an iceberg, then NGOs would be among the more noticeable of the peaks above the waterline, leaving the great bulk of community groups, informal associations, political parties and social networks sitting silently (but not passively) below' (Edwards 2004: 7-8)

The term NGO is an umbrella concept referring to organisations that are very different from each other in terms of geographic area, type of activities, operational area and size. NGOs operate both nationally and internationally in many ways. NGOs may have national offices located in several countries which work under a common name (for example, Amnesty International Ireland, Amnesty International France and so on) and international campaigns and activities are coordinated by a global headquarter (for example, Amnesty International, International Secretariat in London).

Additionally, international NGOs can operate in more than one country through associate or affiliate organisations. Although the terms 'affiliate' and 'associate' are often used interchangeably, they refer to different relationships, forms of governance and control exercised by the international NGO over its local organisations spread around the world. For instance, ActionAid International is structured as a global federation of member organisations, and distinguishes between associates and affiliates as follows: a) affiliates are those organisations that were initially admitted into ActionAid as associates, and now are formally and fully integrated with ActionAid International's governance process, accountability structure and organisational performance; b) associates are autonomous organisations, equipped with their own governance and management structures, that have joined ActionAid International with the aim of being granted affiliate status of ActionAid International in the future (ActionAid 2018). Regarding international development, international NGOs often provide services through grassroots support organisations or local partners - intermediate independent entities - that create links between beneficiaries and the international NGO. In practice, grassroots support organisations and local partners are autonomous entities involved in the international NGO's governance through collaboration or shared decision-making. These intermediate entities have their own organisational structure at the local level and complement the hierarchical structure of international NGOs by establishing close ties with local populations and channelling their needs into the numerous dislocated offices of the NGO's managers.

NGOs undertake a wide variety of tasks and a common distinction is between advocacy and services-provider NGOs. Advocacy NGOs carry out different activities to promote transparency and accountability through 'naming and shaming'. Broadly understood as an 'active espousal of a position, a point of view, or a course of action' (Hopkins 1992: 32), when applied to NGOs advocacy acquires a narrower meaning and it refers to 'any attempt to influence the decisions of any institutional elite on behalf of a collective interest' (Jenkins 2006: 307-308). Two elements of this definition are particularly relevant: on the one hand, the emphasis on private (not just governmental) institutions as objects of advocacy activity, and on the other, the focus on collective interests which in principle may be shared by all people regardless of their membership or personal support to a NGO (Salamon 2002: 3). In practice, advocacy is mainly used to change the behaviour of international and national institutions. As noted in the introduction, advocacy has widely contributed to the creation and promotion of international human rights norms, as well as

to the dissemination of facts concerning alleged human rights violations. Other times, advocacy is used to raise awareness of societal matters affecting communities who are unheard, or unable to speak for themselves. By doing so, NGOs give a voice to those communities in policy settings.

By contrast, service-provider NGOs provide services to meet societal needs (such as education, health, food and security), or to implement disaster management in cases of emergency (e.g. humanitarian aid). By providing concrete services to a given population, NGOs act as a socio-economical agent (Desse 2012: 9-10). Many service-provider NGOs define themselves as 'capability builders' – although this can be the case of advocacy NGOs as well. They seek to supply services to the population, but also, in the long run, to provide the necessary capabilities to service-users so that they are able to shape their own future (ibid). This is typically the case of humanitarian aid and of development projects. When it comes to traditional welfare services, service-provider NGOs act either as a substitute, or as a complementary actor to market and public institutions by fulfilling their typical social functions in meeting social needs (ibid).

NGOs intervene in various fields such as human rights, international development, humanitarian assistance and conflict resolution, public education and environment. A further difference between NGOs is their organisational size. Regardless of their type, and of whether they operate internationally or domestically, NGOs are classified as small, medium or large depending – either jointly or separately – on the number of volunteers, employees, members or service-users, and by looking at their organisational budget. Lastly, and although they are non-profit organisations, NGOs can and do carry out commercial activities. In principle, NGOs are private entities that do not exist primarily to generate profits, either directly or indirectly, and are not primarily guided by commercial goals. However, they are allowed to conduct business activities in connection with a given operation (for example, by renting a property, selling a publication, etc.), and to make a profit, without altering their character, provided that operation is to serve its non-profit-making aim (Council of Europe 1986: para 8). On a practical level, there are three main ways in which NGOs may carry out commercial activities in line with their not-for-profit purposes. First, an NGO may undertake commercial activities as part of its charitable activities, and these activities directly relate to its not-for-profit purpose (Lathlean 2016: 2-3). Second, an NGO may decide to carry out commercial activities to generate a surplus, which will fund its not-for-profit purpose (ibid). Third, an NGO may perform commercial activities, and these activities are only incidental to its primary stated non-for-profit purpose (ibid).

Some NGOs engage in business activities for several reasons, the most obvious of which is that reliance on donations is insufficient to ensure the organisation's survival (ibid). Consequently, revenues from commercial operations can significantly help an NGO to become self-sufficient (Guo 2006: 127). Indeed, NGOs are likely to gain greater financial and political independence from public administration when carrying out business activities (ibid). Moreover, commercial revenues can make a genuine contribution to the organisation's ability to attract new donors or volunteers and can also increase the quality of service delivery (Maier et al. 2016). At the same time, the spread of a business-oriented approach in the non-profit context exposed NGOs to new challenges and criticisms. It was argued, for example, that a business-oriented approach implies a substantial bureaucratisation at a managerial level which, in turn, could distract NGOs from their mission and thus undermine their ability to campaign for human rights and societal changes (Eikenberry and Kluver 2004: 132).

Even though there can be similarities between the way NGOs and businesses operate transnationally, it is worth specifying that the concept of accountability acquires a peculiar meaning in the NGO sector compared to the business one. For a start, societal expectations are different for each sector. The essence of NGO accountability rests on the idea that these actors need to prove their ability to achieve long-term transformative goals which, in turn, should lead to a process of empowerment of the communities they provide service to (Banks et al. 2015). According to Slim, NGO accountability can be defined as '(…) a process by which an organisation holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns' (2002). Based on this definition, accountability is a technical process through which an NGO answers transparently ('openly respon[ds]'*)* for its actions ('what it does'), its omissions ('what it does not') and its values and mission ('what it believes'). Aside from performance accountability, Slim introduces 'voice accountability' which requires NGOs to be accountable for what they say. Through voice accountability, NGOs need to prove 'how their voice relates to the people they are primarily concerned about – the poor, people whose rights have been violated, and the victims of war (…) do NGOs speak as the poor, with the poor, for the poor or about the poor?'(ibid).

When applied to the NGO sector, the concept of accountability appears much broader than the corporate responsibility to respect human rights as contemplated in business and human rights instruments. Additionally, the issue of accountability is more obvious and more problematic for

certain NGOs than others. For instance, the need for increased accountability is particularly accentuated in service-provider organisations, where service-recipients are usually external actors to the organisation, and therefore have less of a say in shaping its activities and direction (Ebrahim 2003). On the contrary, the issue of accountability is less problematic for membership-based organisations as they are often run by and for their members (ibid).

This section has provided a classification of NGOs with the view to highlight the similarities between NGOs and corporations, particularly in terms of their transnational character and operations. The next section looks at whether business and human rights instruments are applicable to NGOs, and if so, to what kinds of NGO.

3. Applicability of business and human rights instruments to NGOs

This section examines how the three main business and human rights instruments, the GC, the OECD Guidelines and the UNGPs, may apply to NGOs. Each of the following sub-sections first provides background information about each instrument exploring the role NGOs played in drawing it up, and in promoting compliance with it. The focus then shifts towards the normative content of the three instruments by examining how they can apply to NGOs and to what kind of NGO. While conducting this legal analysis, we make reference to relevant caselaw, and to academic and societal debates.

3.1 The UN Global Compact

The UN Global Compact (GC) was launched in 2000 and is a non-legally binding initiative resting on ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption. Principles 1 and 2 purport that corporations have "to support and respect the protection of internationally proclaimed human rights" and "make sure that they are not complicit in human rights abuses." Principles 3 to 6 focus on labour rights and Principles 7 to 9 on the environment. Principle 10 is based on the UN Convention against Corruption. Participation to the GC is open both to business and non-business organisations including academic institutions, cities and municipalities, labour unions, public sector organisations, NGOs and civil society organisations more broadly. So far, over 10, 000 businesses and almost 4,000 non-business entities have joined the GC. Normatively, the relevance of this instrument for NGO accountability is therefore clear since the GC is explicitly applicable to them.

During the drawing up process of the GC, selected international NGOs were invited to contribute (Kell and Levin 2003: 151). Human Rights Watch, Amnesty International and the Lawyers Committee for Human Rights were chosen for their competences in the area of human rights. Transparency International, Save the Children and the Ring Network were selected in light of their expertise in their respective areas of intervention. Four well-established environmental NGOs joined the consultation process too: the World-Wide Fund for Nature, The International Union for Conversation of Nature, the World Resources Institute and the International Institute for Environment and Development. The International Labour Organisation represented Labour interests. Although NGOs were initially critical of the draft version of the 10 Principles, they played a crucial part in setting up the GC website, which is the main infrastructure for the implementation of this UN initiative (Buhmann 2016: 182). Moreover, the GC website features commentaries by NGOs on good corporate practices (Kell and Ruggie 1999: 5).

A first group of international NGOs joined the GC in 2000. Among the first signatories were the Global Reporting Initiative (Netherlands), the International Union for Conservation of Nature (Switzerland), Korea International Volunteer Organisation (Republic of Korea), Transparency International (Germany) and the World Resources Institute (USA). Since then, the number of NGOs participating in the GC has grown year after year. At the time of writing, 572 international NGOs and 1013 domestic NGOs situated in all areas of the globe signed up to the GC. Participant NGOs are diverse in terms of type, size, and area of intervention (UN Global Compact website, "our participants").

To join the GC, non-businesses are required to send a letter of commitment to the UN Secretary-General expressing their commitment to the 10 Principles. Every two years, they must submit a 'communication on engagement' (COE). The COE is tailored to non-business participants. COEs must provide a description of actions taken to 'support' the 10 Principles (UN Global Compact, Policy on COE for Non-business Organisations) By contrast, business participants are required to submit a 'communication on progress' (COP) that describes actions taken (or planned) to 'implement' the 10 Principles. Essentially, the COE is a disclosure tool through which participants inform stakeholders about their engagement with the GC and their undertakings to support the 10 Principles. On a practical level, non-business participants can engage with the GC platform in many ways including policy dialogues, learning activities, taking part in the GC local networks and developing partnership projects with corporations. One of the

COE's purposes is to show how non-business participants support business participants in meeting the latter's commitments.

The GC website clarifies that 'non-business participants are also encouraged to commit their organisation to the 10 Principles and to report on progress made within their organisation' (UN Global Compact website, "About the Global Compact – Frequently Asked Questions"). In other words, non-business participants are expected to operationalise the 10 Principles at an organisational level, and to report their progress in that respect. Accordingly, the COE is not only a disclosure tool through which non-business participants show their contribution in facilitating the implementation of the 10 Principles by businesses. It also serves as an important demonstration of a non-business organisation's commitment to support and implement the GC within their own structures and activities.

In sum, the GC is relevant and apply to NGO operations for several reasons. First and foremost, participation to the GC is explicitly open to non-business participants, including NGOs. Any NGO can take part regardless of its size, type, area of activity and geographic location. Second, at the time of writing, over 1,500 NGOs signed the GC as non-business participants. Third, the GC requires non-business participants, in their COEs, to inform stakeholders about their engagement with the GC. This disclosure practice is not limited to actions taken to support the implementation of the 10 Principles among businesses. It also encompasses efforts made by non-business participants to operationalize the GC within their organisations.

3.2 The OECD Guidelines for Multinational Enterprises

The OECD Guidelines represent one of the first international attempts to regulate global business as a response to the emergence of the 'New International Economic Order' in the early 1970s (De Schutter 2006). The OECD Guidelines, adopted in 1975, consist of non-binding recommendations addressed by governments to multinational corporations operating in or from adhering countries. This voluntary instrument defines standards of behaviour for, and promote a responsible approach to, business in different areas, such as transparency, human rights, the environment and taxation. The Guidelines target corporate actors operating transnationally. At the national level, governments adhering to the OECD Guidelines are required to set up a National Contact Point (NCP). As state-based non-judicial grievance mechanisms, NCPs provide a forum for mediation and conciliation for resolving practical issues related to the non-observance of the OECD Guidelines.

Over the years, NGOs have played a critical role in filing complaints before NCPs against multinational corporations. NCPs have dealt with about 350 cases submitted by civil society groups and NGOs between 2001 and 2020 (OECD Watch 2020). A dedicated civil society network of NGOs called OECD Watch conducts research on aspects related to the implementation and effectiveness of the OECD Guidelines, and supports civil society organisations and victims of corporate abuse who wish to file complaints before NCPs (OECD Watch, "About us"). Additionally, OECD Watch contributed to the 2011 revision of the OECD Guidelines strengthening provisions on human rights, supply chain responsibility and gas emission (ibid).

Although the OECD Guidelines were originally designed to address the behaviour of transnational corporate entities, an emerging caselaw supports the view that the Guidelines are also applicable to non-corporate entities, including NGOs. The matter came before the Norwegian NCP in 2011 in a complaint against Norwegian Church Aid (NCA), a Norwegian NGO, with regard to its running of a camp in Kosovo in which Roma people lived. The complainants argued that NCA, although

> *not a 'business' as such (....) receives nearly half its money from public funds and spends most of the money operating internationally in several different countries. It is alleged that Norwegian Church Aid is a mixed enterprise as 50% of its money comes from the state. Furthermore that a plain reading of the OECD text "companies or other entities" show that more than commercial companies were intended to be covered by the Guidelines.* (NCP Norway 2011: 5)

The NCP refused to follow that line of reasoning and asserted instead that the Guidelines are part of the OECD Investment Declaration, and as such 'require a business nexus'(ibid: 6) Moreover, they noted no reference to non-commercial organisations in the *travaux préparatoires* of the Guidelines (ibid). They declared the complaint inadmissible but not before having discussed the matter with the OECD Investment Committee at the Annual Meeting of the NCP in Paris in June 2011. While this does not change the final outcome, it is interesting that the NCP felt the need to discuss this with others, which shows the matter was not straightforward. The discussion between the different NCPs, summarised in the Report by the Chair of the 2011 meeting of the National Contact Points, highlights a lack of consensus on the question of the applicability of the OECD Guidelines to NGOs at the time (OECD 2011: 21). Since then, important developments have occurred.

In 2015, the Swiss NCP allowed a complaint brought by the Building and Wood Workers' International (BWI), a global union federation, against Fédération Internationale de Football

Association (FIFA), a not-for-profit entity under Swiss law (NCP Switzerland 2015). In their submission, BWI claimed that FIFA had violated the Guidelines by choosing Qatar as the host state of the FIFA 2022 World Cup while the human rights violations of migrant workers in Qatar are well-known (ibid: 1). While also presenting arguments on the merits, hence admitting that the Guidelines applied to them, at least to some extent, FIFA noted in their statements that 'for the sake of good order and accuracy,' they 'believe[d] that it [was] important to discuss how the OECD Guidelines apply to FIFA, considering that they are an association registered in the Commercial Register in accordance with Articles 60ff. of the Swiss Civil Code' (ibid: 2). In its assessment of the applicability of the Guidelines, the NCP noted that the Guidelines do not precisely define the term 'multinational enterprises'. It quoted Chapter I paragraph 4 of the Guidelines, which refer to how multinational enterprises operate 'in all sectors of the economy', and 'usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways'. It continued:

> *The OECD Guidelines expressly establish legally non-binding principles and standards for responsible business conduct, which is generally understood as the responsibility of entities involved in business or commercial activities. The key question should therefore be whether an entity is involved in commercial activities, independently of its legal form or its sector of activity. Whether an entity can be considered to have commercial activities, should be decided by the competent NCP through a case-by-case analysis based on the concrete circumstances* (ibid: 6).

The NCP then examined FIFA's activities and concluded that given the activities at stake in the complaint, the Guidelines were applicable in this instance (ibid). In another case against FIFA brought in 2016 by Americans for Democracy and Human Rights in Bahrain (ADHRB), the Swiss NCP applied the same criteria (NCP Switzerland 2016a). They concluded that FIFA's activities allegedly in violation of the Guidelines, as argued in the complaint, were not linked to its commercial activities, and therefore fell outside the scope of the Guidelines (ibid: 5). In other words, the Swiss NCP considered it had jurisdiction *ratione personae* against FIFA, but not *ratione materiae* due to the impugned activities.

In December 2016, the Swiss NCP was called again to decide on whether the Guidelines apply to non-business entities. The matter arose following a complaint filed by Survival International (SI) against the World-Wide Fund for Nature (WWF), a non-profit organisation. The complaint accused WWF of facilitating violent abuse against Baka 'Pygmies', forcing them to

leave their homeland in Cameroon to make way for a national reserve (NCP Switzerland 2016b). This complaint was the first one filed by an NGO against another NGO using the OECD Guidelines. Both organisations campaign for the well-being of others, in contrast to FIFA. The NCP applied the same reasoning as in the previous complaints against FIFA, and declared the OECD Guidelines applicable to WWF based on two main considerations. Firstly, WWF International led activities of the WWF network with offices in more than 80 countries, meeting the transnational nature criterion required by Chapter 1(4) for the applicability of the OECD Guidelines (ibid:8). Secondly, even if WWF International's operations may not *per se* qualify as being of a commercial nature, unlike other global business entities, WWF's approach to conservation was to a certain extent market-based. This is because it carries out a variety of commercial activities. For example, the income of the WWF network is being generated from royalties and selling collectors' albums, and from the use of the panda emblem for the sale of environmentally friendly products (ibid).

Similarly, the Swiss NCP is now examining a complaint against the Roundtable on Sustainable Palm Oil (RSPO) on behalf of Transformation for Justice (TuK Indonesia), an Indonesian community rights group (NCP Switzerland 2018). The RSPO is a multistakeholder initiative (MSI) but legally speaking it is an association under Swiss law (ibid: 5). The NCP declared the complaint admissible in May 2018. In March 2019, the UK NCP received a complaint against the sugar MSI Bonsucro. Bonsucro is a London-based company limited by guarantee which describes itself as a global multi-stakeholder non-profit organisation (NCP UK 2019, para 2). The complaint focuses on Bonsucro's failure to prevent land grabs in Cambodia by one of the participating companies (Ibid: para 3). In September 2019, the UK NCP accepted the complaint for further examination highlighting that a precise definition of multinational enterprises is not required for the purpose of the Guidelines (ibid: para 13). The UK NCP reasoned that the Guidelines apply to Bonsucro being a parent company with over 500 company members operating across more than 40 countries (ibid). Essentially, the Guidelines should apply to Bonsucro as its operations are inherently multinational (ibid). Additionally, the UK NCP considered itself as an appropriate forum to evaluate allegations perpetrated by a participating entity overseas as there is business relationship with the parent company's operations, products or services based in London (ibid: 14).

The decisions of the Swiss and the British NCPs set important precedents because NGOs and non-profit entities more broadly can potentially be held accountable by their peers for non-compliance with the OECD Guidelines. Thus the OECD Guidelines are an accountability tool for NGOs, or at least some of them. The Swiss NCP has set out three cumulative criteria to evaluate what kind of non-profit entities can be subjected to complaints within the OECD system: a) the NGO must operate in more than one country through national offices, associate or affiliate organisations based in multiple countries or through various forms of cooperation with local independent partners spread worldwide; b) the NGO must operate or be registered within a signatory state of the OECD Guidelines; and c) the NGO must carry out commercial activities, even if it has a non-profit aim (Carolei 2018: 182).

3.3 The UN Guiding Principles on Business and Human Rights

The UNGPs were adopted by the UN Human Rights Council in 2011. They are meant to implement the 2008 "Respect, Protect and Remedy" Framework developed by John Ruggie, then UN Secretary-General Special Representative on the issue of human rights and transnational corporations (SRSG). The Framework makes clear that the State duty to protect human rights is grounded in international law, and cannot be extended to corporate actors. The responsibility of businesses to respect human rights exists independently of the State's duty to protect, and is not grounded in law but is instead a social expectation. The corporate responsibility to respect human rights 'essentially means not to infringe on the rights of others—put simply, to do no harm'(UN Human Rights Council 2008: 9). The Framework is accordingly built upon three pillars: a) the State duty to protect human rights against abuses perpetrated by third parties, including business, through appropriate policies, regulation, and adjudication; b) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and c) greater access by victims to effective remedy, both judicial and non-judicial.

Unlike the OECD Guidelines, which are limited to companies of OECD or adhering countries, the UNGPs apply to all companies, large and small, wherever they are located. The UNGPs do not constitute a legally binding instrument that can be ratified by States, nor do they create new human rights obligations. Rather, they provide a voluntary global framework aimed at

facilitating the implementation in the business sector of existing human rights as codified in international treaties.

During the drawing up process of the UNGPs, the SRSG launched an online consultation for stakeholders to submit their comments (Draft Guiding Principles 2010). The consultation received over 100 submissions from companies, academics, research institutes, law firms and many NGOs. Among them, Amnesty International, CIDSE, ESCR-Net, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, and Rights and Accountability in Development made a joint submission expressing their concerns about the ability of the UNGPs to strengthen human rights responsibilities for businesses. They lamented the absence of a monitoring mechanism aimed at ensuring the UNGPs' consistent implementation, as well as their non-binding character, and opposed their adoption (Joint Civil Society Statement 2011). The Financial Times reported this submission, and later published a series of confrontational follow-up responses by Amnesty International and John Ruggie (Williamson 2011; Ruggie 2011). Despite this shaky start, NGOs became active in the implementation of UNGPs once they were adopted (Ramasastry 2013: 172). Many NGOs have released technical briefings and commentaries to facilitate the implementation of the UNGPs among businesses and to conduct civil society campaigns in support of this UN initiative. These include Oxfam (2013), Human Rights at Sea (2016), and the International Commissions of Jurists (2013). The Business and Human Rights Resource Centre, an international NGO based in London, tracks efforts made by national governments in promoting the UNGPs through National Action Plans and makes available tool-kits and commentaries designed by NGOs in support of the implementation of the UNGPs ("about us").

The primary targets of the UNGPs are governments and businesses. The SRSG was not tasked to address the issue of NGOs accountability within his mandate. Although the UNGPs are explicitly designed to address the human rights responsibilities of corporate and State actors, there is room to argue they implicitly apply to NGOs too. So far, the question of whether NGOs can be subjected to the UNGPs has been addressed in scattered online publications. One was written by two charity lawyers (Wynne and Blakemore 2017), and the other one was published by the head of the Institute for Human Rights and Business (Morrison 2018). One scholarly piece on advocacy NGOs also mentions it (Apodaca 2018: 73) These publications all argue in favour of the application of the UNGPs to NGOs. More recently, it was also proposed to use the UNGPs as a normative

template for developing non-legally binding human rights responsibilities for NGOs (Schimmel 2019: 115-116).

Guiding Principle 14 states that '(t)he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.' The term 'business enterprises' is not clearly defined. As per the commentary on Principle 11, it encompasses *'all'* enterprises 'wherever they operate', regardless of structural, organisational and economic attributes. Thus Principle 14 provides a definition of business enterprise aimed at ensuring the widest range of entities falls within the scope of the UNGPs. Moreover, Principle 14 does not explicitly exclude applying the UNGPs to non-corporate entities.

Considering the convergence of business and human rights standards, and specifically the overlaps between Guiding Principle 14 and Chapter 1(4) of the OECD Guidelines in how they define the term 'enterprise', developments regarding the OECD Guidelines are arguably relevant, by analogy, to the UNGPs. As explained in the previous section, the OECD Guidelines apply not only to global corporate actors but also to international not-for-profit entities that carry out commercial activities, following the test the Swiss NCP developed in the BWI complaint against FIFA. The question is whether an entity conducts business activities, rather than whether it is a for-profit or a not-for profit entity. It is worth noting that the UNGPs were actually framed as a 'global standard for preventing and addressing the risk of adverse human rights impact linked to business activities'(Pillay 2011: 5), and not of businesses. Furthermore, the UN Interpretative Guide on the Corporate Responsibility to Respect Human Rights was presented as a resource 'not just for businesses, but also for Governments, civil society, investors, lawyers and others who engage with business on these [human rights] issues' (UN Human Rights Office of the High Commissioner 2012: 3). This conveys the idea that the UNGPs are accessible to and understandable by different stakeholders, and not a technical, obscure document to be used only by businesses. It is reasonable to submit that the UNGPs can apply to NGOs that carry out business activities. Unlike the OECD Guidelines, the UNGPs apply to all enterprises. Thus it is assumed that the UNGPs can apply to business-like NGOs operating both at national and international levels, through their own national offices, associate or affiliate organisations and local partners based in multiple countries, independently of their size, sector, operational context, ownership and structure in accordance with Principle 14.

Assuming the UNGPs may indeed apply to NGOs, we turn to how NGOs can respect human rights within the meaning of the UNGPs. There, the relevance of the UNGPs to NGO activity appears clearly. The responsibility to respect is a negative responsibility to 'do no harm'. Under the UNGPs, to meet the responsibility to respect human rights, companies should: a) adopt a human rights policy; b) carry out a human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights; and c) adopt processes to enable the remediation of human rights impacts they cause or to which they contribute. Principles 18 through 21 unpack the essential components of the due diligence process which requires enterprises to recognize human rights risks on an ongoing basis and to integrate human rights into business practice, track performance in a credible manner, and adopt grievance mechanisms to remedy human rights abuses.

On a practical level, business-like NGOs can operationalize the human rights due diligence process when they a) provide services to beneficiaries on the ground and collaborate with various stakeholders, especially in risk sensitive regions; b) assess the social and environmental impact of their investment strategies, especially when it comes to socially responsible investments and mission-related investments; and c) enter into contractual relationships with business partners by contemplating contractual terms that create strong incentives for the other party to respect human rights, such as the requirement for the other party to adhere to human rights standards and the right to terminate a contract unilaterally in case such requirement is breached by the other party (Wynne and Blakemore 2017).

One scholar has gone as far as to argue that 'the do no harm' principle, as embedded into the UNGPs, requires advocacy NGOs to prevent and address the human rights impact of their naming and shaming campaigns, regardless of whether they carry out business activities (Apodaca 2018: 73). More specifically, it is argued that due diligence requires advocacy NGOs to carry out an investigation of the predicable direct and indirect impact naming and shaming campaigns could have on the communities affected by the campaign, through a pre-assessment of the campaign's fallout and by developing options for remediation if necessary (ibid).

Without going that far, the UNGPs are at a minimum of relevance to NGO's operations, especially for those conducting business activities, and to a lesser extent for advocacy NGOs. When NGOs carry out business activities and/or engage in naming and shaming campaigns, the UNGPs

can probably apply to them regardless of whether they operate nationally or internationally and independently of their size, structure and sector of activity.

4. Suitability of Business and Human Rights Instruments for NGO Accountability

The previous section has shown how business and human rights instruments may apply to NGOs. This section now turns to establishing the extent to which these instruments are suitable to enhance NGO accountability for human rights. We start by examining their willingness and capacity to abide these standards, and to carry out human rights diligence processes.[3] We then move to another facet of suitability, namely the appropriateness of these standards to regulate what is arguably a very different type of non-state actor. We conclude that business and human rights instruments are versatile enough to accommodate addressees other than for-profit corporations, especially in light of the support these instruments have received from NGOs themselves.

4.1 Willingness

NGO's willingness to observe business and human rights instruments represents an important aspect in determining the suitability of these initiatives for non-profit actors. Willingness is an important indicator of suitability because it tells us how committed NGOs are in applying human rights standards designed for corporations. In recent years, NGOs themselves have spontaneously used business and human rights instruments to enhance NGO accountability. Clearly, NGOs wish to subject themselves to the GC. A growing number of them has signed up to it, and explicitly accepted the human rights commitments it contemplates. International and national NGOs, as well as a multitude of different civil society organisations in terms of size, type and area of activity have joined the GC, highlighting a cross-sectoral consensus among NGOs. Besides the GC, some NGOs have also pushed for the applicability of the OECD Guidelines to organisations that are not formally for-profit businesses. This was evident in the cases before the Swiss NCP because the complaints

[3] Capacity is a criterion developed by Andrew Chaplam in his works on the human rights obligations of non-State actors: he focuses on their capacity to fulfil human rights obligations, rather than looking at legal subjectivity and personality (2006: 65). In this article, we employ the same concept in a different way: we look at the structural capacity of NGOs to undertake business and human rights standards at the organisational level. However, capacity is not enough to address the question of suitability fully. So, we also look at willingness and appropriateness: the former informs us about NGOs' commitment to being subjected to these standards, the latter helps us determine whether it is a good idea to extend the applicability of these standards to a different recipient, other than the one originally intended.

against FIFA and WWF were filed by NGOs, ADHRB and SI respectively, with another one filed by BWI, a union federation. In filing the complaints, not only did ADHRB and SI challenge the behaviour of non-profit entities using a framework purposefully designed for corporations, but they also went further. They gave the Swiss NCP a chance to make a formal, quasi-judicial determination as to whether the OECD Guidelines allow cases against NGOs. Put simply, both ADHRB and SI meant to see the OECD Guidelines applied to their peers. They believed that this normative development should occur.

The Swiss and UK NCP cases have attracted virtually no objection, even from the defendants, on the issue of suitability of the OECD Guidelines, and the Norwegian case in which a business nexus was required therefore seems to be isolated. For example, in the case between SI and WWF before the Swiss NCP, WWF voluntarily committed to the mediation process. Initially WWF stated they did not want to turn the OECD Guidelines 'into a mechanism for resolving issues between two non-profit organisations' (Barkham 2017). However, WWF's defence strategy focused on addressing SI's substantive claims ('land' and 'eco-guard' issues) rather than on objecting to, or even questioning, the applicability of the OECD Guidelines to NGOs (NCP Switzerland 2016b: 4-5). Similarly, Bonsucro did not object the application of the Guidelines. Rather, it questioned whether the UK NCP is an appropriate forum to assess the behaviour of one of its subsidiaries operating overseas (NCP UK: para 14).

The case for suitability is less clear for the UNGPs, though the limited number of commentators who have published on this question support the thesis that sees NGOs subjected to the UNGPs (Wynne and Blakemore 2017; Apodaca 2018; Morrison 2018; Schimmel 2019). FIFA undertook substantive reforms in the past few years, adopting several measures strengthening its human rights commitment, including the 2017 FIFA's Human Rights Policy which incorporates the UNGPs into FIFA's organisational practices (FIFA 2017). Other sports organisations, such as the Union of European Football Association (UEFA 2020) and the International Olympic Committee (IOC 2020) have taken steps towards more accountability for human rights and have used the UNGPs to do so. This corroborates the idea that NGOs in general support the application of business and human rights standards to themselves. It also shows that NGOs are willing to comply with them. Finally, an expert body of the Council of Europe has sustained that, where possible, NGOs 'should be put on equal footing with private businesses' when it comes to reporting and disclosure obligations (2020: para 38).

4.2 Capacity

An important question when examining the suitability of business and human rights instruments for NGOs is whether NGOs are capable, structurally, to meet the human rights responsibility arising from business and human rights instruments. The previous section on applicability highlighted how much NGOs have contributed to the emergence of human rights standards for business, by facilitating the development and implementation of the three instruments under investigation. NGOs are champions of accountability and they contribute in various ways in helping States and corporations to internalise business and human rights commitments, holding them accountable if they fail to do so. Even if some NGOs were initially critical of existing business and human rights instruments, they have contributed to the normative content of the GC, the OECD Guidelines and the UNGPs. As noted previously, NGOs have released technical briefings and commentaries is support of the UNGPs, they have advised victims of corporate abuse to file complaints within the OECD system, and they track, monitor and assess the human rights performance of corporations through self-managed platforms like OECD Watch and the Business and Human Rights Resource Centre. These activities demonstrate that at least some NGOs possess expertise, knowledge and the organisational capacity to facilitate and assess compliance by corporate and state actors with business and human rights instruments. It is suggested here that NGOs use this capacity to voluntarily *self-assess* the human rights performance of their own organisations using instruments with which they are familiar.

4.3 Appropriateness

To complete our examination of the suitability of the business and human rights instruments for NGOs, we now focus on a final question: whether it is appropriate to apply a set of standards designed to regulate a business to a different type of non-state actor. Although there can be similarities between NGOs and business enterprises, they fulfil different functions and roles in society, and have different stakeholders. Thus, a one-size-fits-all approach to accountability, or the idea that accountability is the same for any kind of organisation, may not be appropriate. NGO's beneficiaries, for example, cannot be considered customers of the NGO because they usually do not pay for or choose the services they receive in the way customers do with companies (Kaldor 2003: 21). Similarly, companies receive payments in exchange for goods and services, whereas

NGOs rely on donations and grants to carry out their work (ibid). In that regard, it is worth noticing that grants and donations might come from the business world to co-deliver a project, with businesses and NGOs being subjected to different accountability standards. In the business world, customers, banks and shareholders are to some extent both donors and beneficiaries (ibid; Spiro 2002: 163). Having different stakeholders, NGOs and corporations are required to perform accountability differently. This matter was raised by Tilt when commenting on the Global Accountability Report, which assessed and ranked the world's most powerful global organisations making, *inter alia*, direct comparisons between NGOs and corporations:

> "*This [approach] assumes we can treat NGOs in the same way that we treat companies, an argument which has a number of flaws. Not least is the proposition that NGOs have quite a different role to play in society as will be discussed later, but it should also be noted that companies themselves seek to avoid accountability where possible, and have often been shown to have weak accountability mechanisms. One only has to consider the spate of recent corporate collapses for examples of significant accounting requirements but little accountability*" (2005:5).

Because they have different stakeholders, NGOs and corporations are required to perform accountability differently. As already specified above in the section "defining NGOs", the concept of accountability itself acquires a peculiar meaning in the NGO sector compared to the business sector, which goes beyond the corporate responsibility to respect human rights as contemplated in business and human rights instruments. Therefore, NGOs and business enterprises should be treated differently when it comes to accountability. The main implication of this view is that a tailored approach to NGO accountability – capable of taking into account the peculiarities of the various NGO-stakeholder relations – would be more appropriate to deal with the matter. This does not mean, however, that business and human rights instruments should not be used to enhance NGO accountability, or are unsuitable. On the contrary, they could play a role in addressing NGO accountability, alongside other instruments and practices, such as NGO self-regulation. In other words, business and human rights instruments are not meant to replace those accountability instruments specifically made for NGOs; instead, they should be seen as one of the many instruments available through which NGO accountability can be enacted. Business and human rights initiatives suit particularly well the NGO accountability discourse, especially when NGOs carry out business-like activities. Moreover, NGOs are not only increasingly willing to subject

themselves to these standards, but they are also capable of undertaking human rights due diligence at the organisational level. Overall, these standards are versatile enough and appropriate to regulate NGO operations, thus representing a complementary accountability route to traditional NGO accountability instruments.

5. Conclusion

This article aimed to investigate the extent to which business and human rights instruments are relevant to NGOs so as to tackle what we identified as an NGO human rights regulatory and accountability gap. First, it has shown how, although not primarily designed for them, business and human rights instruments may be applicable to NGOs. At a minimum business and human rights instruments are relevant to NGOs when they undertake business-like activities, but arguably other activities as well. Second, it has established the suitability of business and human rights instruments for the NGO sector, while also noticing that they should go hand in hand with self-regulation and other accountability mechanisms. For example, the Dutch government recently tabled a proposal on the establishment of international ombudsmen for NGOs (Hilhorst et al. 2018). This proposal would need to be explored further because business and human rights instruments alone are not enough but, nonetheless, they deserve consideration as tools to enhance NGO accountability. NGOs play an essential role in defending human rights and furthering social justice, and as such they are vulnerable to attacks from unscrupulous governments. New government-led international initiatives to regulate the sector could be accused of concealing sinister political agendas, or at least of being inappropriately intrusive. By contrast, many NGOs are familiar with business and human rights instruments and have contributed to their drafting. These instruments' goals are far-reaching, and implementing them can be onerous, but they are not overly prescriptive. Applying existing instruments, which requires no further drafting, thus provides an attractive, moderate avenue for NGO accountability. This constitutes our article's main finding, and it has implications that go beyond the question of NGO accountability for human rights. It is also important for the field of business and human rights. The due diligence process described in the UNGPs mandates organisations to identify, prevent, mitigate and remedy their human rights impact in order to meet the (corporate) responsibility to respect human rights. Undertaking this process is challenging for all organisations, whether non-profit or for-profit. If NGOs, like corporations, undertook a transparent human rights due diligence process, communicated about it, and shared best practices,

they would make a concrete contribution to the diffusion of the business and human rights standards, particularly the UNGPs. NGOs' human rights performance, like corporate human rights performance, could be measured with the use of indicators, following for example the model of the Corporate Human Rights Benchmark (CHRB 2020). Overall, the UNGPs would emerge stronger and accountability for human rights, whether NGO or corporate accountability, would be strengthened.

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